No. 78-740

In the Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL., APPELLANTS

v.

L. DOUGLAS ALLARD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

REPLY BRIEF FOR THE APPELLANTS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. Appellees' suggestion (Br. 10) that nothing in the legislative history of the Eagle Protection Act indicates that Congress was concerned with Indian artifacts is incorrect. When the House amended the Act to include golden eagles in 1962, it was specifically noted that the protection was necessary because "[t]he sale of feathers to dealers, curio shops, and Indian tribes has become a lucrative business." 108 Cong. Rec. 5511 (1962) (Rep. Goodling). See also *id.* at 5511, 5513 (articles noting existence of market for feathers); H.R. Rep. No. 1450, 87th Cong., 2d Sess. 2 (1962). The impossibility of identifying the feathers thus sold as having been taken from birds recently killed is demonstrated by the record here (A. 44-46), and amply justifies the congressional

determination to permit only the possession and transportation, but not the sale, barter, or exchange of pre-Act feathers.[1]

This legislative history also refutes appellees' claim (Br. 17) that since the Eagle Protection Act does not refer to "products," it does not comprehend eagle parts used as components of craft items created before the enactment of the Act. The underlying premise of this argument is that eagle parts lose their identity once they become parts of something else. Appellees suggest no reason why that principle should apply only to feathers already incorporated into other products when the Act became effective. Acceptance of appellees' argument would render the Act ineffective to stem the "lucrative business" in eagle feathers which was one of Congress' concerns, for evidently the primary interest of dealers, curio shops and Indian tribes in feathers is as a material for incorporation into craft items.

2. Appellees claim (Br. 13-15) that certain language in the prohibition section of the Japanese Treaty demonstrates that the Migratory Bird Treaty Act applies only to birds alive at the time the Act became applicable to them. Our main brief explains why this language is

[1]Appellees note (Br. 8) that nothing in this record establishes that a market for feathers actually exists. But it has long been recognized that "where the legislative judgment is drawn in question, [the judicial inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154 (1938).

ambiguous (Br. 23 n.31).[2] We add only that the Act refers to the various treaties to determine the birds covered by the Act, but not to define the prohibitions applicable to them. Those are contained in the Act itself, 16 U.S.C. 703.[3] It is accordingly appropriate to consult the sections of the various treaties that describe their coverage, rather than their prohibition provisions, to determine the scope of the Act. As noted in our main brief (Br. 21-23), all the treaties involved define the birds covered in terms of their species or families, thus including both alive and dead specimens of the described varieties.

3. Appellees contend (Br. 16-17) that the fact that comparable legislation contains specific exemptions for pre-existing animal products justifies reading a similar exemption into the Acts involved here. But those provisions suggest instead that when Congress intended such an exemption, it provided for it explicitly, defining precisely the circumstances in which it was to be applicable. Moreover, the provision in the Endangered

[2]Appellees' resolution of the ambiguity is inconsistent with the clear language of the treaty with the Soviet Union, which expressly prohibits "any sale, purchase or exchange of these birds, whether dead or alive, or their nests or eggs, and any sale, purchase or exchange of their products or parts." T.I.A.S. No. 9073 (see our main Br. 6 n.10). If appellees are correct, pre-existing parts of birds covered by the Soviet treaty, but not those of birds covered by the Japanese Treaty, are within the Act. This would create needless administrative confusion.

[3]The Act necessarily contemplates that the prohibitions in the Act are broader than those required by the treaties, since the Secretary is authorized to grant exemptions to the prohibitions in the Act when such exemptions are "compatible with the terms of" the treaties. 16 U.S.C. 704. Thus, at most, appellees' interpretation of the Japanese Treaty means that the Secretary could, in his discretion, exempt the pre-existing parts of birds covered by the Japanese Treaty from the Act.

Species Act on which appellees primarily rely, 16 U.S.C. 1538(b), does not apply to "wildlife held in the course of a commerical activity," and thus would not benefit appellees even if it were read into the Acts at issue here.[4]

4. Appellees maintain (Br. 20-21) that at least appellee Ward has standing to assert an unconstitutional taking of his property.[5] The record shows that he acquired his artifacts, all but one of which contain eagle feathers (A. 52-53), between 1968 and 1973 (A. 54).[6] Appellees also note that eagles were not included in the Migratory Bird Treaty Act until 1972 (Br. 4 n.10). But since the Eagle Protection Act has protected bald eagles since 1940, and was extended to the golden eagle in 1962, the record in fact demonstrates that Ward did not acquire the right to sell the eagle feathers when he purchased the artifacts after 1962 (A. 53-54).[7]

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[4]This exception is explained in the Conference Report, H.R. Rep. No. 93-740, 93d Cong., 1st Sess. 27 (1973): "[T]he provision * * * create[s] an affirmative defense with respect to noncommercial activities, permitting a qualified person to plead in defense to a charge of violation of the Act that the goods or animals themselves were in their hands or under control on the effective date of the Act. Only persons holding such goods and animals for other than commerical purposes would be enabled to plead this subsection as a defense, such as noncommerical zoos, private collectors of animals and the owners of fur coats and rugs."

[5]Appellees' apparent suggestion (Br. 21) that their standing to raise alternative, subsequently abandoned, constitutional challenges somehow carries with it standing to assert the constitutional claims they assert in this Court is without merit.

[6]The single exception contains possible prairie chicken feathers (A. 53), but prairie chickens are not subject to the Migratory Bird Treaty Act (42 Fed. Reg. 59358-59362 (1977)). Moreover, the record does not show whether Ward obtained the two artifacts containing feathers of protected birds in addition to eagle feathers before those birds came under federal protectiom in 1972.

[7]Since those purchases were themselves in violation of the Eagle Protection Act, appellee Ward does not have clean hands in seeking the equitable remedy of a declaratory judgment.

Appellees' argument on the merits of the constitutional issue is flawed by the assumption that the Acts prohibit the sales of the artifacts themselves, rather than simply of the feathers they contain. While it is true that the Acts prohibit the purchase or sale of the artifact so long as it includes the feathers, nothing in the Acts prohibits any dispesition of the artifact without the feathers. It is by no means clear that the inability to sell the feathers has deprived the artifacts of all commercial value, since, as appellees themselves recognize, "artifacts are composed only in part of feathers, often a small part" (Br. 18; see A. 50-59). Therefore, independently of the objections to appellees' constitutional claims identified in our main brief, the record here is insufficient to support their claim of an unconstitutional taking.[8] In the absence of any showing of how the value of any particular artifact is related to the value of the feathers it contains, or how its value would be affected if the feathers were removed (and perhaps replaced with artificial facsimilies), the "essentially ad hoc, factual inquiries" to determine the economic impact of the Acts on the appellees, and the extent to which they have "interfered with distinct investment-backed expectations" (*Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978)) simply cannot be

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[8]Under the analysis in Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 61-62 (1964), cited in *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 125 (1978), the Acts at issue here would not in any event involve the taking of private property for public use requiring just compensation under the Fifth Amendment, since they result in no benefit to any government enterprise. Instead, they more closely approximate the situation in which the government is actng as arbitrator between competing private interests; in that situation, Professor Sax argues, no compensation is constitutionally required. See also Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149 (1971).

made.[9] Since appellees have not shown that the Acts impose an unreasonable burden on them, they have failed to show their constitutional invalidity. *Goldblatt* v. *Hempstead*, 369 U.S. 590, 595-596 (1962).

For these reasons, as well as those discussed in our main brief, the judgment of the district court should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1979

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[9]The record does suggest that the economic impact of the Secretary's interpretation of the Migratory Bird Treaty Act on appellees is minimal.

Seven of the artifacts contain the feathers of eagles as well as birds protected by the Migratory Bird Treaty Act; the sale of those artifacts would be a violation of the Eagle Protection Act. Six contain only the feathers of unidentified birds, so the impact of the Treaty Act on them cannot be determined. Of the remaining five artifacts that do not contain eagle feathers, three contain only the feathers of birds not protected by the Migratory Bird Treaty Act (parrot and quail(A. 50), prairie chicken (A. 53); see 42 Fed. Reg. 59358-59362 (1977)). The remaining two artifacts contain flicker feathers. Althoiugh the flicker has been protected since 1918 (39 Stat. 1703), appellees date the artifacts in 1920 and the early 1940's (A. 50).